U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 26 December 2006

Case No.: 2006-TLC-00013

In the Matter of:

GLOBAL HORIZONS, INC.,
GLOBAL HORIZONS MANPOWER, INC., and
MORDECHAI ORIAN, an individual,

RESPONDENTS.

Appearances:

Vincent C. Costantino, Esquire
Office of the Solicitor of Labor
For the Administrator, Office of Foreign Labor Certification

Mindy S. Novik, Esquire
Dean A. Rocco, Esquire
Jackson Lewis LLP
For the Respondents

Before: WILLIAM DORSEY
Administrative Law Judge

Decision and Order Denying Respondents' Emergency Application for a Stay

The application the Respondents filed for an emergency stay of the Secretary of Labor's final debarment order entered on November 30, 2006, is treated as one made under Section 10(d) of the Administrative Procedure Act[1] (APA), 5 U.S.C.A. § 705 (West 1996). The harm to the Respondents' business is counterbalanced by harm to the public interest if a stay is granted, so the stay is denied.

[1] Under the APA, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C.A. § 705 (West 1996).

A. Background

This matter arose under the temporary alien agricultural labor portion of the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188(b)(2)(A) (West 2005), and the Secretary of Labor's implementing regulations published at 20 C.F.R. Part 655 (2006). The Respondents' business provides foreign workers for American farms, after obtaining certifications from the Secretary of Labor that there are not enough workers in the United States who are able, willing, qualified and available at the time and place needed to perform that agricultural labor. 8 U.S.C.A. §§1101 (a)(15)(H)(ii)(a), 1184(a) (West 2005); 20 C.F.R. § 655.90(b)(1) (2006). They use the Secretary's certifications to obtain H-2A visas from immigration authorities that allow workers to enter the United States as nonimmigrants to perform seasonal or temporary agricultural work. The Administrator of the Department of Labor's Office of Foreign Labor Certification, Employment and Training Administration (the Administrator), who reviews H-2A certification applications, has the authority to debar employers who "substantially violate" the program's requirements. 20 C.F.R. §§ 655.92 & 655.110 (a) & (b).

On July 27, 2006, the Administrator determined that the Respondents made fraudulent and willful misrepresentations in an application that had been approved, a substantial violation under 20 C.F.R. § 655.110(g)(1)(i)(E). He served them with a notice debarring them from submitting temporary alien agricultural labor certification applications for three years.

The Respondents requested *de novo* review of their debarment on August 11, 2006. 8 U.S.C.A. § 1188(e); 20 C.F.R. § 655.110(a) (offering applicants for certification the opportunity to request an expedited administrative review of a determination within seven calendar days of the date of the Administrator's notice). A Decision and Order issued on November 30, 2006 (the Dismissal) found that the Respondents' hearing request was untimely and failed to qualify for equitable tolling. The Administrator's July 27, 2006 debarment became the Secretary of Labor's final order. The Administrator thereafter denied four H-2A certification applications from the Respondents that were pending when the Dismissal was issued, and any others they file likely will be denied on the same basis.

On December 8, 2006, the Respondents applied for a stay of the Dismissal under Rule 62, Federal Rules of Civil Procedure (F.R.Civ.P.). Declarations were filed supporting the application from the Respondents' attorney, Dean A. Rocco, with exhibits A-C (Rocco Exs. A-C) and from the individual Respondent, Mordechai Orian, who is also President of the two corporate Respondents, with exhibits A-E (Orian Exs. A-E). They specified the harm the Respondents' business would suffer unless the debarment were stayed, as well as difficulties the debarment would cause their customers and H-2A employees.

A district court may suspend, modify, or restore an injunction it has issued while an appeal is pending. *See* Rule 62(c), F.R.Civ.P.[2] That rule does not apply to matters pending

[2] The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges say that in situations not covered by those rules "or any statute," the Rules of Civil Procedure for the District Courts of the United States apply. 29 C.F.R. §§18.1 and 18.29(a)(8) (2006). The statutory provision on stays pending review at 5 U.S.C.A. § 705 obviates resort to Rule 62, F.R.Civ.P.

before the Secretary of Labor, an executive officer with no inherent equity powers. The APA authorizes agencies to stay their final orders when "justice so requires." 5 U.S.C.A.§ 705, quoted in footnote 1 above. That section of the APA also authorizes a reviewing Article III court to stay an agency's final order pending its review.[3] Rule 18(a), Federal Rules of Appellate Procedure (F.R.App.P.) describes how appellate courts exercise that power. C.A. Wright, A.R. Miller, E.H. Cooper, 16A FED. PRAC & PROC. Juris.3d § 3964 (2006 Supp.)

B. The Factors the Secretary Considers When Evaluating a Stay Application

In deciding whether to stay a final order while an Article III courts reviews it, the Secretary of Labor evaluates: 1) the likelihood that the moving party will succeed on the merits of the request for review; 2) whether the moving party will be irreparably injured absent a stay; 3) the prospect that others will be harmed if the stay is granted; and 4) where the public interest lies. *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ Case No. 2003-SOX-15 (ARB June 9, 2006) (Order Denying Stay); *Cefalu v. Roadway Express Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55, slip op. at 2 (ARB May 12, 2006) (Order Denying Stay); *Office of Fed. Contract Compliance Programs v. Univ. of North Carolina,* Case No. 84-OFC-20 (Sec'y April 25, 1989) (Order Denying Stay). Other federal agencies consider these factors as they resolve stay requests. *See e.g., In re: Station KDEW (AM), Dewitt, Arkansas*, 11 F.C.C.R. 13,683, 1996 WL 591011 (FCC Oct. 16, 1996); *Briggs v. Nat. Council on Disability*, 68 M.S.P.R. 296; 299 (MSPB July 25, 1995) (denying the employing agency's stay request); *In the Matter of the Applications of Timpinaro*, *et al.,* 50 S.E.C. Docket 238, 1991 WL 288326 at *2 (SEC Nov. 12, 1991) (Order Denying Stay).

The factors obviously have been derived from those that the federal district courts apply when they rule on applications for preliminary injunctions, and on motions for a stay pending appeal under Rule 62(c), F.R.Civ.P., and that the courts of appeals apply under Rule 18(a), F.R.App.P. The courts of appeals relied on them in ruling on requests to stay agency orders in *State of Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987) (staying an order of the NRC that granted a nuclear power plant a full power operating license); and in *Associated Securities Corp. v. SEC,* 283 F.2d 773 (10th Cir. 1960) (declining to stay SEC orders that excluded individuals and entities from the securities business because protection of the investing public outweighed the detriment they suffered).

---

[3] After the language quoted in footnote 1, Section 10(d) of the APA goes on to say that:

> "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C.A. § 705 (West 1996).

During the December 15, 2006, telephonic conference to set the time for the Department to respond to the stay application, the Respondents stated they intended to seek review and apply for a stay in an appropriate federal court if the Secretary did not stay the Dismissal.

1. Irreparable Harm to the Respondents

The Respondents insist that to deny a stay pending judicial review amounts to a "corporate death penalty." They function as a sort of labor broker, linking farm workers with American farmers. They are more than brokers, however, for they become the workers' employer, and contract their labor out to farmers. The Respondents project gross revenue of $11 million from their work during 2006. Orian Declaration at ¶ 5. Mr. Orian says that if the Dismissal order makes the debarment immediately effective, the Respondents "will not be able to recruit and hire local or foreign workers. . . ." Orian Declaration at ¶ 21.

There is some hyperbole here. The debarment prevents the Respondents from applying to the Administrator for the certification required to obtain H-2A visas to admit aliens to the United States as temporary or seasonal workers. The Respondents remain free to recruit domestic, or what the Orian declaration calls "local" workers. I infer that the majority of the workers the Respondents employ are aliens who enter the United States on H-2A visas, because Mr. Orian emphasizes in ¶ 3 of his declaration that the farmers who are his clients "avoid the costs associated with the . . . H-2A program," but the declaration ought to be more specific. Enough domestic workers might be recruited to maintain the Respondents' business at some lower level of gross revenue, but the tenor of Mr. Orian's declaration leads me to doubt that the business would be viable in the long term.

The H-2A visa program admits aliens only for periods of less than one year; jobs that last twelve months or more are presumed to be permanent, so H-2A workers cannot fill them. 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. §§ 655.100(c)(2), 655.101(g); *Kentucky Tennessee Growers Association*, *Inc*., 1998-TLC-1, slip op. at 5 & text accompanying footnote 8 (ALJ Dec. 16, 1997) (explaining that nine month's employment is a red flag for further inquiry into whether a job is "temporary," but it may qualify for the H-2A program). A separate program with more rigorous standards apply to certifications of aliens to work in permanent jobs in the United States. 8 U.S.C.A. §1182(a)(5)(A) (West 2005) and 20 C.F.R. Part 656 (2006).

.

The three-year debarment necessarily forces the Respondents to progressively wind down the H-2A aspects of their business in the first year and precludes those operations for the next two years. The debarment currently prevents them from filling jobs encompassed in the four certification applications pending before the Administrator on November 30, 2006,[4] as well as jobs encompassed by additional certification applications the Respondents intend to file.[5] Without the ability to obtain new H-2A business, in time they eventually will have to lay off 25 corporate employees (22 in its Santa Monica, California headquarters and one each in the states of Florida, Hawaii and Washington).

[4] These included 15 jobs harvesting corn and soybeans for Pioneer Hi-Bred International Inc. in Hawaii; 30 jobs harvesting mushrooms for Creekside–Sno Top in Pennsylvania; 8 jobs harvesting flowers and cabbage for Monden Farms, LLC in Hawaii and 2 jobs harvesting coffee for Grassman Farms in Hawaii. Orian Declaration at ¶¶ 11–14.

[5] These include 9 jobs harvesting flowers for Kula Farms in Hawaii; 5 jobs harvesting gourds for Good Harvest in Pennsylvania; 4 jobs harvesting flowers for Howard's Nursery in Hawaii; 8 jobs harvesting corn and soybeans for Pioneer Hi-Bred International, Inc. in Hawaii and 10 jobs harvesting gourds and vegetables for Cedar Meadow in Pennsylvania. Orian Declaration at ¶ 18.

Mr. Orian says in his declaration that the Dismissal and debarment will cause the Respondents to lay off the agricultural laborers they hired,[6] but I do not understand why they should. The Administrator neither voided nor interfered with contracts the Respondents negotiated with farmers and farm workers already admitted to the country on H-2A visas. The farm workers may continue their agricultural work, and farmers may continue to pay the Respondents for that labor. Out of the farmers' payments the Respondents would continue to pay the farm workers' wages and provide their other benefits (including workers' compensation insurance, housing and transportation) over the course of the agricultural season they were hired to work. Present jobs are not at risk, assuming that the Respondents negotiated contracts that earn a profit, or at least cover their costs.

The Respondents also assert that they will be forced to break the lease for their headquarters, which expires in July of 2009 and costs $12,932.59 per month, because it will no longer be able to do any business. Orian Declaration at ¶¶ 8 & 10. They remain liable to pay for their current H-2A workers' living quarters in Florida, Utah, Colorado, Pennsylvania, New York Hawaii and California, and rent for a storage unit in Los Angeles that together cost $27,280.09 per month. *Id.* at ¶ 9.

It is impossible to predict how long the review proceedings will take, but as they go on, the Respondents' existing labor contracts cannot be replaced using foreign workers unless a stay is granted. Because I do not know the portion of foreign workers the Respondents currently hire, or how readily they may substitute domestic workers for them, I do not know how long their business may be viable. The Administrator argues that the Respondents should be able to increase their reliance on domestic workers, because unemployment among farm workers was about double the unemployment rate for all occupations in 2003, the last year for which data was available in the economic report he offered, entitled "Farm Labor Shortages and Immigration Policy."[7] Administrator's Ex. 2, Table 2 at pg. CRS-11. But the report acknowledges that there may be "farm labor shortages in certain areas of the country at various times of the year." *Id.* at pg. CRS-8; *see also* pg. CRS-16. Those spot shortages appear to be exactly what the H-2A visa program was meant to ameliorate. The Administrator also points out that hiring in U.S. farms and ranches was down 5% on a year to year basis for the week of October 8–14, 2006 according to a Nov. 17, 2006 report of the National Agricultural Statistics Service of the U.S. Department of Agriculture. Administrator's Ex. 2 at pg. 1. This single week's data says nothing about the availability of labor in specific areas of the country at the times crops must be harvested.

While the evidence on this factor is less specific than it ought to be, on balance it weighs in favor of a stay. *See In Re Hayes Microcomputer Products, Inc.,* 766 F.Supp. 818, 823 (N.D. Cal. 1991) (staying injunctive relief in a patent infringement action conditioned on the quarterly deposit by the defendants of royalties in an insured bank account while the appeal remained pending); *U.S. v. TGR Corp.,* 1998 WL 846746 (D. Conn.) at *3 (staying civil disabilities under

[6] Orian Declaration at ¶ 10.

[7] L. Levine, FARM LABOR SHORTAGES AND IMMIGRATION POLICY, Congressional Research Service (Feb. 22, 2005).

Rule 38(g), Federal Rules of Criminal Procedure,[8] after TGR Corp. was convicted of violating the Clean Water Act[9] which otherwise would disqualify it from all government procurement opportunities[10] during the appeal of the conviction to the Second Circuit).

The Respondents' hardship must be evaluated in tandem with the likelihood of their success on the merits. As hardship increases, likely success recedes but does not disappear from the calculus. *Washington Metro. Area Transit Comm. v. Holiday Tours*, 559 F.2d 841 (D.C. Cir 1977) (upholding the district court's decision to continue the *status quo* pending appeal, which allowed a motor coach sightseeing service to carry on without a certificate of public convenience while it appealed a permanent injunction against its unregulated operation); *Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1174 (9th Cir. 2006) (recognizing the inverse relationship of hardship and likelihood of success).

2. The Likelihood That the Respondents will Succeed on the Merits in the Review Proceeding

The probability of success is not approached mathematically. The Respondents need not demonstrate that there is a greater than 50% likelihood that the Dismissal will be reversed or remanded. *Cuomo v. U.S. Nuclear Regulatory Comm.*, 772 F.2d 972, 974 (D.C. Cir. 1985). The movant's burden, as Judge Frank characterized it, is to show that questions going to the merits of the dispute "are so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation." *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2nd Cir. 1953) (upholding a preliminary injunction that forbade a company that had purchased a competitor's stock from voting that stock, pending a trial on the merits of a Clayton Act antitrust claim).

The issues to be presented to an Article III court include whether the procedures set out in 20 C.F.R. § 655.110 and 655.112 are facially vague and lack clarity because their text does not identify the standard the Secretary will apply in deciding whether to accept a late hearing request. Respondents' Stay Application at 10. Decisions of the U.S. Supreme Court establish that the Secretary is free to choose any combination of rulemaking and case-by-case adjudication as she administers the programs Congress entrusted to her. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947). Whether the Secretary has the discretion to determine the consequences of failing to file a timely hearing request through an individual adjudication rather than through rulemaking would not present a reviewing court with a difficult or doubtful question.

---

[8] The process to stay disabilities in criminal cases such as *TRG Corp*. is a different one, as the Sixth Circuit pointed out in *State of Ohio ex rel. Celebrezze, supra*, 812 F.2d at 291.

[9] 33 U.S.C.A. § 1319(c)(2) (West 2001).

[10] These included the Clean Water Act's prohibition against awarding any federal contracts, loans or benefits to an entity convicted of violating the Clean Water Act (33 U.S.C. § 1368), and the government-wide debarment and suspension regulations of the Office of Federal Procurement Policy that the Environmental Protection Agency had adopted at 40 C.F.R. § 32.415(a). *TGR Corp*, *supra*, 1998 WL 846746 at *3.

The Respondents also will argue that the Dismissal is arbitrary and capricious, and exceeds the Secretary's statutory jurisdiction. Respondents' Stay Application at 10. Challenges to rules themselves have a limited probability of success, given the high degree of deference Article III courts accord to agency procedures and statutory interpretations when Congress has left a gap for the agency to fill, and the agency has engaged in notice and comment rulemaking. *United States v. Mead Corp,* 533 U.S. 218, 227 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The claim that the Dismissal was an arbitrary or capricious action triggers review that is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *See Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotations omitted); *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 450 F.3d 930, 934 (9th Cir. 2006); *Irvine Medical Ctr. v. Thompson*, 275 F.3d 823, 830-31 (9th Cir. 2002) (explaining the deference owed to an agency decision).

There was no dispute about the two core facts—the date the Administrator sent the debarment notice and the date the Respondents sent the Administrator their request for hearing. To contend that the Dismissal is premised on facts not in evidence, without identifying the crucial missing fact(s), provides nothing to weigh or evaluate on this factor.

The law on the standards to qualify for equitable tolling is well established both in the Secretary's decisions, and in the Article III courts. The application of the admitted facts to that body of law presents no unusual or difficult issue.

Looking deeper into the Respondents' Stay Application, the Rocco declaration states that the review request "will raise several novel legal issues including *inter alia* this Court's analysis of the facts and legal issues surrounding Respondents' request for *de novo* review and the legality and constitutionality of the debarment process set forth in 20 C.F.R. § §§ 655.110 and 655.112." *Id.* at ¶ 7. The SEC was not persuaded to stay its final order by those barred from the securities industry while an Article III court considered their allegations the agency's rules were "discriminatory, anti-competitive and unconstitutional." *In the Matter of the Applications of Timpinaro*, *et al., supra*, 1991 WL 288326 at *6. Without greater specificity, a citation to controlling legal authority that the Dismissal decision failed to heed, or the identification of a specific legal issue of first impression that will be presented for review,[11] as the district court did in *General Teamsters Union Local 439 v. Sunrise Sanitation Services Inc*., 2006 WL 2091947 at *3 (E.D. Cal 2006), the Respondents have not framed "serious, substantial, difficult and doubtful" questions.

The Respondents have not shown a probability of success on review. I do not believe, on the other hand, that the review request they have described would be frivolous, *i.e.,* an appeal so meritless that its result is foreordained. *See Jimenez v. Madison Area Tech. Coll*., 321 F.3d 652, 658 (7th Cir. 2003) (applying that definition of "frivolous" in the context of Rule 38,

[11] The district court identified the issue "whether presenting employees with a Hobson's choice between their interest in securing new representation and preserving their existing CBA is consistent with national labor policy" as "a matter of first impression in this circuit," after it had found the chance of success on another issue the movant raised "entirely speculative." *Sunrise Sanitation Services Inc*., *supra*, 2006 WL 2091947 at *3.

F.R.App.P.).

Based on the allegations in the Respondents' Stay Application and the supporting declaration, this factor does not weigh in favor of a stay.

3. Substantial injury to others

The Respondents are correct that the Administrator himself suffers no prejudice from judicial review, or from the task of reviewing additional certification applications the Respondents may submit.

The Respondents allege the farmers and workers will suffer if the debarment remains in effect, for they are a labor provider "unlike almost any other in the country" because they employ the foreign workers. Orian Declaration at ¶ 3. Their clients avoid liabilities that result from an employment relationship and the costs of the H-2A program, which include application fees, immigration, travel and housing expenses, legal services, worker's compensation insurance, payroll, and benefits administration and local state and federal administrative scrutiny. *Id*. The Respondents are adamant that their services are needed because their client farmers regularly require their assistance to obtain labor in the specific way they structure the transaction.

The Orian declaration never says the Respondents achieve any unique or unusual economies of scale in their contracts. Whatever benefit farmers may accrue from the way the Respondents do business, the fees paid to the Department for the certification, and the H-2A workers' travel, housing, transportation, insurance, payroll or benefits costs don't disappear; the price farmers pay the Respondents must cover them all. No evidence shows that farmers would incur additional costs if they were to be the employer for the H-2A workers who harvest their crops.

Mr. Steve Groff, a Pennsylvania farmer and one of the Respondents' clients, did not "pretend to know why a judge would [debar the Respondents]." Orian Ex. E. Nonetheless, he believes that if the Respondents "were not able to continue to provide these necessary workers which we can't get from anywhere else, it would have extremely devastating consequences, not just for me, my farm and my family, but for the countless growers in the U.S. who continue to face every day an uphill battle getting their harvests picked while honoring the laws of the land." *Id.* I accept that Mr. Groff may not have another ready source of foreign workers if he cannot use the Respondents' services, and may find himself in a difficult situation. This is not adequate evidence to extrapolate, as Mr. Groff does, that "devastating consequences" would follow for "countless growers in the United States" if the Respondents are barred from submitting temporary alien agricultural labor certification applications. Inferences so broad cannot be drawn from a single data point.

Data from government reports that the Administrator provided in his opposition to the application for an emergency stay show that during the week of October 8–14, 2006 total employment on American farms and ranches was 1,077,000.[12] The Administrator certified about

[12] See the Nov. 17, 2006 report of the National Agricultural Statistics Service of the U.S. Department of Agriculture for the week of October 8–14, 2006. Administrator's Ex. 2 at pg. 1.

59,000 nonimmigrants as H-2A workers in fiscal year 2006, who were employed by 6,551 employers.[13] Nothing in the Respondents' declarations indicates that their withdrawal from the market that provides farmers with H-2A workers would have an appreciable effect on the labor supply available to American agriculture.

The Respondents offer a statement by Mr. Erik Nicholson of the United Farm Workers Association, AFL-CIO, about why the Respondents' services are necessary to H-2A workers. Orian Ex. D. Mr. Nicholson explained that if the Respondents lay off the 200 unionized H-2A workers they employ nationwide, farmers will not be able to complete their harvests. The workers will lose valuable protections provided in the UFWA's collective bargaining agreement with the Respondents that guarantee workers' wages and seniority rights. *Id.* As pointed out earlier, nothing about the Administrator's notice or the Dismissal interferes with existing contracts the Respondents have with farmers or with domestic or foreign agricultural laborers. There is no reason to believe that fewer H-2A workers will be hired in the United States over the next three years if the Respondents are not their employer. Whether future workers would toil in jobs covered by a collective bargaining agreement cannot be known today.

The harms to unionized workers and to farmers that Mssrs. Nicholson and Groff describe are essentially restatements of the harm to the Respondents' business. They represent double counting if they are separately weighed as part of the "injury to others" factor after they have been considered in assessing "irreparable harm."

On the whole, this factor adds little to the analysis. The Respondents have failed to show that more harm would come to third parties if the debarment remains in effect that if it were to be stayed.

4. The Public Interest

The stay requested would not maintain the *status quo ante*. The Respondents' existing contracts are unaffected by the Dismissal; they require no stay to be completed. The Respondents seek something more—to obtain other certifications from the Administrator, that will lead the immigration authorities issue additional H-2A visas to foreign workers. Those H-2A applications require attestations from whoever serves as the employer, detailing how that employer will meet its obligations to provide the minimum benefits the regulations prescribe to this new population of vulnerable temporary foreign employees. 20 C.F.R. § 655.101(b)(1), (2); 655.102(b); 655.103.

The Administrator's findings in his July 27, 2006 debarment notice became final when the Respondents failed to seek timely review. The Administrator's investigation found that the Respondents willfully misrepresented in an approved certification application that they had contracts for 200 jobs with Taft Vegetable Farms when they did not, and falsified the reasons the H-2A workers were terminated (for poor performance) when they actually fired them because

[13] Draft H-2A TEMPORARY AGRICULTURAL PROGRAM STATISTICAL YEARBOOK FOR FISCAL YEAR 2006, Employment and Training Administration, U.S. Dept. of Labor (Dec. 2006). Administrator's Ex. 3 at pg. 3.

the Respondents could not find them work. No farmers were damaged in that situation precisely because none had contracted with the Respondents for those workers, but the H-2A workers suffered when they were fired.

The Administrator now has reason to doubt the Respondents' honesty; their certification applications no longer can be taken at face value.[14] It is not in the public interest to continue to certify additional applications, while review proceeding are pending, from entities that investigation has shown are untrustworthy. *See* the SEC's analysis in *In the Matter of the Applications of Timpinaro*, *et al., supra*, 1991 WL 288326 at *6 (discussing the negative effect on securities markets if stays were granted pending judicial review); *Associated Securities Corp. v. SEC,* 283 F.2d 773 (10th Cir. 1960).

C. Conclusion

The Respondents have made an adequate showing that they stand to suffer irreparable injury to their business if the debarment becomes immediately effective. The Administrator's findings, which have become established as a consequence of the failure to make a timely hearing request, show serious misconduct that harmed past H-2A workers, that reflects adversely on the Respondents' honesty. They have not shown that they are likely to prevail on the merits in their proceeding to review the Secretary's final order, nor that third parties are likely to suffer unduly unless the stay is granted. The balance of the equities does not tip in the Respondents' favor.

Order

The Respondents application for an emergency stay of the Secretary of Labor's final debarment order entered on November 30, 2006 is denied.

A

William Dorsey
Administrative Law Judge

[14] The hyperbole in the Orian declaration does nothing to dispel this concern.